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No. 90-762

# In the Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS FREYTAG, ET AL., PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a special trial judge of the Tax Court could hear petitioners' cases and prepare a report on them under Section 7443A(b)(4) of the Internal Revenue Code (26 U.S.C.).

2. Whether petitioners could consent to have their cases heard by a special trial judge whose appointment they now assert to be in violation of the Appointments Clause, Art. II, § 2, Cl. 2.

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### OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A13, is reported at 904 F.2d 1011. The opinion of the United States Tax Court, Pet. App. A14-A69, is reported at 89 T.C. 849.

### JURISDICTION

The judgment of the court of appeals was entered on July 6, 1990. A petition for rehearing was denied on August 15, 1990. Pet. App. A97-A98. The petition for a writ of certiorari was filed on November 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY PROVISION INVOLVED

Section 7443A of the Internal Revenue Code (26 U.S.C.) provides in pertinent part as follows:

(b) **Proceedings which may be assigned to special trial judges**

The Chief judge may assign—

(1) any declaratory judgment proceeding,
(2) any proceeding under section 7463,
(3) any proceeding where neither the amount of the deficiency placed in dispute (within the meaning of section 7463) nor the amount of any claimed overpayment exceeds $10,000, and
(4) any other proceeding which the chief judge may designate,

to be heard by the special trial judges of the court.

(c) **Authority to make court decision**

The court may authorize a special trial judge to make the decision of the court with respect to any proceeding described in paragraph (1), (2), or (3) of subsection (b), subject to such conditions and review as the court may provide.

## STATEMENT

Petitioners attempted to deduct on their income tax returns large "losses" supposedly incurred as a result of their participation in a tax shelter scheme. When the Commissioner of Internal Revenue disallowed those deductions, petitioners filed petitions in the Tax Court. Trial began before a regular judge of the Tax Court,[1] but that judge became ill shortly after trial began. A special trial judge[2] was assigned

[1] The Tax Court is comprised of 19 judges who are nominated by the President and confirmed by the Senate to serve fixed terms of 15 years. 26 U.S.C. 7443(a), (b) and (e).

[2] A special trial judge is appointed by the chief judge of the Tax Court. 26 U.S.C. 7443A(a). The Tax Court currently employs 14 special trial judges. Special trial judges receive 90% of the salary of regular Tax Court judges and do not serve fixed terms. 26 U.S.C. 7443A(d).



to complete the trial, which was videotaped so that the regular judge could view the testimony and ultimately render the decisions.

After all the evidence was taken, however, the regular judge became too ill to decide the cases, and he retired as an active judge. Petitioners then consented to having the special trial judge prepare findings and a proposed opinion to enable another regular judge of the Tax Court to decide their cases. The special trial judge's report found that the tax shelter in which petitioners participated was a sham and that petitioners entered into the shelter primarily to avoid payment of income taxes. Pet. App. A47. The chief judge of the Tax Court adopted the special trial judge's report and entered decisions in favor of the Government. Pet. App. A14. The court of appeals affirmed. Pet. App. A1-A13.

1. Each of the petitioners invested in a commodity tax straddle program operated by First Western Government Securities (First Western). Stated simply, petitioners informed First Western how much tax loss they wished to secure and First Western charged petitioners fees of seven to eight percent of the desired losses. The fees supposedly were paid for contracts to take or deliver Government mortgage-backed securities approximately 14 to 30 months in the future. In fact, no market in these securities existed so far in the future and no securities were ever delivered. Instead, First Western created investment portfolios on a computer in which petitioners would simultaneously contract to buy securities at some future date (the "long" leg of the

straddle) and sell similar securities at another future date (the "short" leg of the straddle). If allowed by the Internal Revenue Code, the straddle scheme would have allowed petitioners to close out the loss leg and deduct the loss against that year's ordinary income, while at the same time holding open the gain leg until a later year and deferring recognition of income. Pet. App. A3-A5, A8-A9, A14-A15, A19 n.6, A25-A26.

2. The Commissioner disallowed deductions generated by "investments" in First Western, and participants in that scheme filed approximately 3,000 cases in the Tax Court asserting the deductibility of their "losses." Petitioners' four cases, together with six others, were chosen as test cases and consolidated for trial.[3] Pet. App. A5.

Trial commenced in December of 1984 before the Honorable Richard C. Wilbur, a regular judge of the Tax Court. When Judge Wilbur became ill, Chief Judge Samuel B. Sterrett assigned the cases to Special Trial Judge Carleton D. Powell to complete the trial. The proceedings were videotaped so that Judge Wilbur could view the testimony at home and prepare a report and render the decisions when he recovered his health. None of the petitioners objected to this assignment. Pet. App. A5-A6.

After all the evidence was taken, Judge Wilbur learned that his medical condition would not allow him to prepare the report and decide petitioners' cases.[4] By order dated July 23, 1986, Chief Judge

[3] Appeals from the decisions entered in three of the other test cases were taken to the United States Courts of Appeals for the Fourth and Sixth Circuits. Those cases were later settled.

[4] Judge Wilbur's disability compelled him to retire from the Tax Court, and he has assumed senior status.



Sterrett notified the parties that—unless they objected—he would assign Special Trial Judge Powell to prepare the report in their cases in accordance with Section 7443A(b)(4) of the Internal Revenue Code (26 U.S.C.), and that action on the report would be taken "by Judge Wilbur, or if not by this Division of the Court." App., *infra*, 2a. One taxpayer objected to the assignment, and its case was severed. The remaining taxpayers, including petitioners, agreed to the assignment on the understanding that Judge Wilbur or Chief Judge Sterrett would review Special Trial Judge Powell's report and make the decision of the Tax Court in accordance with Section 7443A(c) of the Code (26 U.S.C.). Pet. App. A6; App., *infra*, 1a-2a.

Special Trial Judge Powell's report recommended that petitioners' deductions not be allowed. He found that "[t]he transactions between First Western and its customers were illusory and fictitious" and were "entered into primarily, if not solely, for tax-avoidance purposes." Pet. App. A47. His report described a tax shelter scheme in which First Western's ability to "control[] losses" through its computer system was so "fine[ly]-tune[d]" that it could "reach any result" its clients desired. *Id.* at A50. The computer-created "market" in which petitioners "invested" was so artificial that it "could not have existed if there had been any real economic substance to its program." *Id.* at A54. In reality, "First Western's world consisted of a computer spitting out paper showing huge transactions that had no economic significance except in petitioners' attempts to raid Federal and State fiscs." *Ibid.* The report concluded that petitioners should be sanctioned under Section 6673 of the Code (26 U.S.C.), because their litigating position was "frivolous." But rather than sanction petitioners and

their counsel, the report merely served notice that petitioners' cases would be "the last free bites of that apple." Pet. App. A64.

On October 21, 1987, Chief Judge Sterrett entered an order adopting the special trial judge's proposed findings and opinion and holding that petitioners' straddle transactions with First Western were shams and, in the alternative, were not entitled to loss deductions because they had not been entered into primarily for profit.[5] Decisions were subsequently entered in accordance with that opinion by Judge Sterrett's successor as chief judge of the Tax Court, the Honorable Arthur L. Nims, III. Pet. App. A6, A14, A47-A65.

3. Petitioners appealed on the grounds that the transactions they entered into with First Western were not shams, and that they had intended to make a profit. For the first time, petitioners also argued

[5] Petitioners assert that Chief Judge Sterrett adopted the special trial judge's report within a "few hours" after its submission. Pet. 3, 12. In fact, the record does not reveal the date on which the special trial judge submitted his report to the chief judge. Petitioners apparently *assume* that Chief Judge Sterrett did not review the special trial judge's report before he formally assigned petitioners' cases to himself that same day.

The date on which Chief Judge Sterrett formally assigned the cases to himself is no evidence of the date on which he received the special trial judge's report. The chief judge entered numerous orders in petitioners' cases prior to that date. The chief judge's statutory duty was to review petitioners' cases in sufficient detail so that the decision he entered was his own, and not the special trial judge's. 26 U.S.C. 7443A(c). There is no basis in the record for assuming he did not do so. Cf. *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965) (administrative agencies are entitled to the presumption "that they will act properly and according to law").



that the assignments of their cases to the special trial judge were unlawful. They contended that Section 7443A(b)(4) of the Code (26 U.S.C.) allows special trial judges to hear only minor tax cases. In addition, they contended that appointment of special trial judges by the chief judge of the Tax Court, as authorized by Section 7443A(a) of the Code, violates the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Pet. App. A7-A9 & n.9, A11 n.11.

The court of appeals affirmed the Tax Court's decisions in all respects. It held that Section 7443A(b)(4) of the Code (26 U.S.C.) authorized assignment of petitioners' cases to a special trial judge for hearing and report, and observed that Tax Court procedure requires a regular judge of the Tax Court to "control[] the outcome of the case."[6] The court further concluded that by consenting to the assignment of their cases to the special trial judge, petitioners waived any objection they might have raised under the Appointments Clause. Pet. App. A7-A8 & nn.7, 9.

On the deductibility of petitioners' claimed tax shelter "losses," the court of appeals held that the

[6] The court of appeals rejected petitioners' assertion that Chief Judge Sterrett "rubber-stamped," Pet. 12, the special trial judge's report and instead presumed that he fulfilled his duty to review the report and enter his own decision for the Tax Court. The court of appeals observed that "[t]he record before us is devoid of any evidence that even remotely suggests otherwise, other than the short time span between the filing of the special tax judge's report and the issuance of the Tax Court's opinion by its chief judge." Pet. App. A8.

Although petitioners repeat their belief that Chief Judge Sterrett exercised only "cursory supervision" over the special trial judge, Pet. 11; see *id.* at 2, 13, they do not seek review of the court of appeals' rejection of their claim.

Tax Court "could not help but" conclude that the First Western transactions were shams, Pet. App. A8, and that it was "ludicrous to suggest that these petitioners had anything but a most fleeting interest in a potential economic gain" with respect to those transactions, *id.* at A11 n.11. Accordingly, the court affirmed the disallowance of petitioners' deductions.

## ARGUMENT

The decisions of the courts below are correct and do not conflict with the decisions of any other courts. Further review is not warranted.

1. Section 7443A(b)(4) is clear on its face: "The chief judge may assign— * * * (4) any other proceeding which the chief judge may designate [*i.e.*, any proceeding other than the ones listed in subsections (1) through (3)], to be heard by the special trial judges of the court." The legislative history confirms that "any other proceeding" carries no hidden limitations regarding case size or complexity. In amending former Section 7456(d) (now Section 7443A) in 1984 to provide expressly for this category of assignments, the House Report explains:

> A technical change is made to allow the Chief Judge of the Tax Court to assign *any* proceeding to a special trial judge *for hearing and to write proposed opinions*, subject to review and final decision by a Tax Court judge, *regardless of the amount in issue*. However, special trial judges will not be authorized to enter decisions in this latter category of cases.

1 H.R. Rep. No. 432, 98th Cong., 1st Sess. 266 (1983) (emphases added). The Conference Report



"follows the House bill." H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1127 (1984).[7]

The "technical" nature of the 1984 amendment adding Section 7443A(b)(4) underscores the fact that the historic office of the special trial judge (and his predecessor, the commissioner) has been to hear and prepare reports on *any* cases within the Tax Court's jurisdiction. Prior statutes imposed no limitations whatsoever on the cases that a special trial judge could be assigned to hear (but not decide). *E.g.*, Revenue Act of 1943, ch. 63, § 503, 58 Stat. 72; Section 7456(c) of the Internal Revenue Code of 1954 (as originally enacted); Tax Reform Act of 1969, Pub. L. No. 91-172, § 958, 83 Stat. 734.[8]

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[7] Petitioners cite but one case in support of their contention that only minor tax cases may be assigned to special trial judges under Section 7443A(b). Pet. 9. That case is *Page* v. *Commissioner*, 86 T.C. 1, 12-13 (1986). Critically, *Page* involved the small case procedure of Section 7443A(b)(2) and Section 7463 (*i.e.*, that applicable to cases involving less than $10,000), *not* the "any other proceeding" category established by Section 7443A(b)(4) and pursuant to which the special trial judge was assigned to hear petitioners' cases. Thus, the Tax Court's holding in *Page* that the small case procedure should not be employed when the issues presented are significant casts no doubt on the propriety of the assignment in petitioners' cases. Any doubt whether the Tax Court believes that major tax cases may be assigned to special trial judges under Section 7443A(b)(4) is completely dispelled by petitioners' own observation that "14,500 complex so-called tax shelter cases" are presently assigned to special trial judges of the Tax Court "pursuant to § 7443A(b)(4)." Pet. 2 n.2.

[8] By comparison, the authority to assign special trial judges to *enter decisions* in cases has been expressly limited to narrow categories of cases since its origin in 1974 as a mechanism to accommodate an anticipated flood of employee benefit cases. Employee Retirement Income Security Act of 1974,

Notwithstanding the unambiguous statutory text, committee report, and history of Section 7443A (b)(4), petitioners contend that the proceedings to which special trial judges may be assigned to hear and report under subsection (b)(4) should be limited to those "minor tax cases," Pet. 9-10, described in subsections (b)(1) through (b)(3), in which special trial judges may enter the decision of the Tax Court. Petitioners' contention is an ejusdem generis argument in disguise.[9] But it disregards the triggering principle of that canon of construction—namely, that the general phrase following the specific phrases must be of the same class. Section 7443A(c) indicates that the proceedings described in subsection (b)(4) are in a different class than the proceedings in subsections (b)(1) through (b)(3). The latter proceedings include declaratory judgment proceedings ((b)(1)), small cases (involving less than $10,000 conducted under the procedures set forth in Section 7463 of the Code ((b)(2)), and other small cases involving less than $10,000 ((b)(3)). In each of those three proceedings, the chief judge may authorize a special trial judge to render the decision of the Tax Court. Section 7443A(c). In contrast, in proceedings under subsection (b)(4)—"any other proceeding" except the three previously listed—the case may only be

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Pub. L. No. 93-406, § 1041(a), 88 Stat. 949-950; see Sections 336(b)(1) and 502(b) of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2841-2842, 2879) (codified as amended at 26 U.S.C. 7443A(b)(1)-(3)).

[9] This canon provides that general words following specific words in a statutory enumeration are to be construed to embrace objects similar in nature to those covered by the specific words. See, *e.g.*, *Garcia* v. *United States*, 469 U.S. 70, 74 (1984).



"heard" by the special trial judge; a regular judge of the Tax Court must make the ultimate decision. Section 7443A(c); Tax Ct. R. 183. The inescapable inference from the statutory language and structure is that Congress intended to differentiate between declaratory judgment actions and small proceedings, which a special trial judge could hear *and* decide, and "any other proceeding," which the special trial judge could be assigned to hear, but *not* decide.[10]

Petitioners' reliance on *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), Pet. 10-11, is entirely misplaced. That case involved the question whether the Federal Magistrates Act, 28 U.S.C. 636(b), authorized a District Court judge to assign a magistrate to preside over a selection of a jury in a felony trial without the defendant's consent. Although this Court observed that the statutory language broadly allowed assignment to a magistrate of "such additional duties as are not inconsistent with the Constitution and laws of the United States," it reasoned that presiding over jury selection was unrelated to the carefully defined grant of authority to conduct trial of civil matters and of minor criminal cases, and was at odds with the "repeated statements" in the legislative history that magistrates should only "handle subsidiary matters to enable district judges to concentrate on trying cases." 109 S. Ct. at 2245. As a result, the

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[10] This difference between proceedings under subsections (b)(1)-(3) and those under subsection (b)(4) also answers petitioners' contention that a literal construction of "any other proceeding" in the latter subsection would render the former "superfluous." Pet. 9. The distinguishing feature of proceedings under subsections (b)(1)-(3)—that special trial judges can make the decision of the Tax Court—gives them independent significance regardless of the scope given to subsection (b)(4).

Court concluded that Congress did not intend for the "additional duties" clause to embrace presiding over jury selection in felony trials. *Id.* at 2247. Unlike the structure and legislative history of 28 U.S.C. 636, however, the structure and legislative history of Section 7443A(b) demonstrate that Congress unequivocally intended to authorize the chief judge of the Tax Court, in his discretion, to designate special trial judges to hear and prepare proposed findings and opinions in "any" proceeding before the Tax Court, regardless of the amount involved or the nature of the controversy. Accordingly, *Gomez* provides no basis for disregarding the plain language of the statute and the equally unambiguous legislative history.

At bottom, petitioners' abiding concern is that Chief Judge Sterrett "rubber-stamped the special trial judge's findings and opinion just a few hours after receiving them without reviewing the evidence or changing a single word." Pet. 12; see *id.* at 2. As we have pointed out, the basis for this accusation is a nonsequitur, note 5, *supra*; petitioners' charge was not credited by the court of appeals, note 6, *supra*; and petitioners do not seek this Court's review of their indictment, *ibid.*[11]

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[11] Although one court of appeals has held that the Tax Court can review the proposed factual findings of a special trial judge only under a "clearly erroneous" standard of review, see *Stone* v. *Commissioner*, 865 F.2d 342, 345 (D.C. Cir. 1989), reversing *Rosenbaum* v. *Commissioner*, 45 T.C.M. (CCH) 825 (1983), the Tax Court itself has never retreated from its established practice, as set forth in that case, that it retains the ultimate responsibility for making all factual determinations, unfettered by the proposed findings that might be set forth in a special trial judge's report. Moreover, after *Stone* was decided the Tax Court abandoned its practice of furnishing litigants a copy of the special trial judge's report and inviting the parties to file exceptions. Pet. App. A8 n.8. As the court of appeals concluded, "this change in rules, in our view, confirms that the Tax Court's relationship with its special trial judges cannot be analogized to typical appellate review." *Ibid.* Instead, notwithstanding "that the special trial judge's recommended findings of fact shall be presumed correct, it is the division of the Tax Court to which the case is formally assigned that controls the outcome of the case." *Id.* at A7 n.8. The court of appeals' understanding was also petitioners' position, at least in the court of appeals. Pet. C.A. Reply Br. 3 ("Petitioners are entitled to a careful *de novo* review of the findings of a special trial judge by a tax court judge because the special trial judge cannot make the decision in a case assigned to him under § 7443A(b)(4)" (footnote and citation omitted)). But see Pet. 11 ("This presumption [of correctness due the factual findings of special trial judges] flatly precludes *de novo* review by the Tax Court.").



2. Because petitioners expressly consented to the assignment of the special trial judge who heard their cases in the Tax Court, the court of appeals did not address the merits of their constitutional challenge to his appointment under the Appointments Clause, Art. II, § 2, Cl. 2. Pet. App. A8 n.9 ("By consenting to the assignment * * * the Taxpayers waived this objection."). In the absence of any consideration of the merits of petitioners' Appointments Clause challenge by *any* court of appeals, it would be premature for this Court to resolve that issue in the first instance.[12] The only question properly before the Court

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[12] At this time, only the Tax Court has addressed the Appointments Clause issue petitioners urge the Court to decide. In a decision involving First Western itself and its principal promoters, which was rendered after the decisions in petitioners' cases, the Tax Court sustained the appointments of the special trial judges. *Samuels, Kramer & Co.* v. *Commissioner*, 94 T.C. 549 (1990), appeal pending, Nos. 90-4060 & 90-4064 (2d Cir.). Unlike petitioners, the taxpayers involved

is whether petitioners could effectively consent to have their cases heard by a special trial judge whose appointment might otherwise have been challenged under the Appointments Clause.

In determining whether this consent question merits the Court's review, the Court should reject at the outset petitioners' fact-bound contention that their consent was "[]coerced" because the alternative was to retry their case before a new judge. Pet. 27-28. This plea might have merit in other cases. But cf. *CFTC* v. *Schor*, 478 U.S. 833, 850 (1986) (not finding coercive consent to trial before an administrative adjudicator even though "quicker and less expensive" than trial in court). But it has a singularly insincere ring in a case, such as this one, where the relief petitioners seek is precisely the retrial they claim "[]coerced" their consent to begin with. In sum, the Court should grant review of the consent question only if it believes that (1) litigants cannot under any circumstances consent to the assignment of a special trial judge to hear their cases, and (2) this issue is worthy of review even in the absence of a conflict in the circuits. The consent question does not warrant review.

a. This Court has emphasized that "[n]o procedural principle is more familiar to [the] Court than that a * * * right may be forfeited in criminal as well as civil cases by failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); accord *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940); *Blair* v. *Oesterlein Co.*, 275 U.S. 220, 225 (1927) ("There are specially cogent reasons why this rule should be

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in *Samuels*, *Kramer* objected to the assignment of their cases to a special trial judge.



adhered to when the question involves a practice of one of the great departments of the government."); see *United States* v. *Gagnon*, 470 U.S. 522, 528 (1985) (per curiam) (holding right to be present at all stages of a criminal trial waived); *Levine* v. *United States*, 362 U.S. 610, 619 (1960) (holding due process right to public trial waived); *Segurola* v. *United States*, 275 U.S. 106, 111-112 (1927) (holding Fourth Amendment challenge waived). Requiring timely assertion of an objection serves two important purposes: it promotes judicial economy by alerting the lower court to a problem at a time when it can take corrective action, see *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977); and it prevents a party from pursuing a certain course at trial for tactical reasons and later—if the outcome is unfavorable—claiming that the course followed constituted reversible error, see *id.* at 89.

Petitioners' conduct in this case falls squarely within the letter and spirit of this Court's settled practice of requiring contemporaneous objections. Petitioners did more than just commit a procedural default in the Tax Court, they expressly consented to the assignment of a special trial judge to hear their cases. Petitioners' consent led the Tax Court to assign special trial judge Powell to prepare a report on their cases, rather than another judge, as was ordered in the case of the one litigant who *did* object to the assignment. See p. 5, *supra*. If petitioners are permitted to withdraw their consent now, many months of trial time will have been wasted. What is worse, petitioners will have been permitted to withdraw their consent and assert reversible error not just after the trial, but after they learned that the supposed error did not work to their benefit. The sequence of events in this litigation illustrates precisely

what the contemporaneous objection rule was designed to prevent.

b. In the court of appeals, petitioners attempted to avoid the contemporaneous objection requirement by invoking the exception which prevents parties from conferring subject matter jurisdiction on a court by their consent. See *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). That exception has no application here.

A subject matter jurisdiction challenge questions the authority of the *office*, not the authority of the particular occupant of the office (the *officer*). The court of appeals understood this distinction. It allowed petitioners to challenge for the first time on appeal a purported statutory limitation on the subject matter jurisdiction of the special trial judge to hear and report on their cases under Section 7443A (b)(4) of the Code (26 U.S.C.). Pet. App. A7. At the same time, it declined to entertain petitioners' attack on the method by which the special trial judge assigned to hear their cases was appointed. See *id.* at A8 n.9. Unlike challenges to subject matter jurisdiction, an Appointments Clause argument

> is not "jurisdictional" in the sense that it cannot be waived by failure to raise it at the proper time and place. It is not the sort of claim which would defeat jurisdiction in the District Court by showing that an Article III "Case" or "Controversy" is lacking.

*Morrison* v. *Olson*, 487 U.S. 654, 670 (1988). If the Appointments Clause challenge in *Morrison* could not be waived, this Court would have had no occasion to consider (as it did in the indented quotation above) whether the rule of *Blair* v. *United States*, 250 U.S. 273, 282-283 (1919), barred a challenge to the independent counsel's appointment. For if the manner



of appointment can be questioned at any stage of the litigation, no rule governing the scope of appeals such as the one in *Blair* could have insulated the allegedly defective appointment from this Court's review. In that event, this Court would simply have made that point and promptly disposed of *Blair*. It did not. The necessary implication of the Court's analysis is that Appointments Clause challenges directed solely at the officer are not the same as jurisdictional challenges directed at the office; the former, unlike the latter, can be waived.[13]

c. For the first time in this Court, petitioners now claim that an argument premised on the Constitution's structural separation of powers is not available. Pet. 24-26.

In *CFTC* v. *Schor*, *supra*, this Court held that parties may waive their personal right to adjudication by an Article III court, 478 U.S. at 848-850, but "[t]o the extent that this structural principle [of Article III] is implicated in a given case, * * * notions of consent and waiver cannot be dispositive because the

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[13] *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), and *Lamar* v. *United States*, 241 U.S. 103 (1916), on which petitioners rely, Pet. 26, are not to the contrary. Neither case holds that this Court *must* depart from its settled practice of requiring a contemporaneous objection. At most, those cases stand for the proposition that the Court has subject matter jurisdiction to reach the merits of a constitutional claim not raised by the parties below. *Glidden Co.* v. *Zdanok*, 370 U.S. at 535-537 (plurality opinion); *Lamar* v. *United States*, 241 U.S. at 117-118; cf. *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940) ("But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.").

limitations serve institutional interests that the parties cannot be expected to protect," *id.* at 850-851. In *Schor*, the institutional interest at stake was the "institutional integrity of the Judicial Branch," *id.* at 851—an interest that was arguably threatened by the adjudication of a " 'private' right" claim in a non-Article III court, *id.* at 853.

Unlike the situation in *Schor*, the assignment of special trial judges in Tax Court cannot raise the specter of "a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts," 478 U.S. at 855, because tax controversies are not matters of private right "normally reserved to Article III courts," *id.* at 853. As petitioners concede, Pet. 16-17, tax disputes are "matters, involving public rights, * * * which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper," *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). The need to enforce "Article III limitations" that prompted the Court to dishonor the express consent in *Schor* thus has no application to this case.[14]

Nor does the rationale of *Schor* justify creation of an exception to the contemporaneous objection requirement for the Appointments Clause challenge raised by petitioners in this case. Together with the Incompatibility Clause, Art. I, § 6, Cl. 2, the Ap-

[14] *Pacemaker Diagnostic Clinic of America* v. *Instromedix*, 725 F.2d 537 (9th Cir) (en banc), cert. denied, 469 U.S. 824 (1984), is distinguishable for the same reason. At issue in that case was the consensual assignment of a case to a magistrate for adjudication. Thus, the case presented essentially the same question as in *Schor*—whether an official who did not enjoy the life tenure and salary protection guaranteed to the Article III judiciary could properly adjudicate the claims in question.



pointments Clause reflects the Framers' rejection of the cardinal feature of Parliamentary systems in which members of the Legislature serve as and appoint executive officers. The structural interests protected by the Appointments Clause are thus those of the President and the Executive Branch itself, which can be expected vigorously to challenge legislative encroachments on the presidential prerogatives under that Clause. Unlike the Article III limitations at issue in *Schor*—which could not be waived "because the limitations [of Article III] serve institutional interests that the parties cannot be expected to protect," 478 U.S. at 851—the Appointments Clause embodies an interest that at least one of the parties to every tax dispute (the United States) can be expected to protect. Accordingly, there is no reason, as there was in *Schor*, for saving petitioners from the choice they made when they affirmatively consented to allow the trial to proceed in accordance with statutory procedures.

* * * * *

In light of petitioners' express consent to the hearing before a special trial judge, the petition should not be held pending the Second Circuit's decision in *Samuels, Kramer & Co.* v. *Commissioner*, Nos. 90-4060 & 90-4064, Pet. 8—a case in which the taxpayers did not expressly consent to hearing before a special trial judge.[15] This petition cannot in any sense be "held" for *Samuels, Kramer* because the Second Circuit has not handed down any judgment, its decision will not necessarily decide the Appoint-

[15] In *Samuels, Kramer*, the Government is defending the authority of the chief judge of the Tax Court to appoint such special trial judges on the theory that he qualifies as the "Head[] of [a] Department[]" within the scope of that Clause.

ments Clause issue on which petitioners seek review (the government presented two alternative grounds for decision), the losing party (whichever side that may be) has not decided to file a petition for a writ of certiorari, and this Court has not determined whether the issue merits review at this time.

In truth, petitioners move this Court to defer consideration of their petition for an indeterminate time until it becomes known whether a petition for a writ of certiorari raising the Appointments Clause question will be filed in *Samuels, Kramer*. Regardless of the outcome in *Samuels, Kramer*, however, petitioners are not entitled to benefit from any decision this Court might render in that case because they expressly consented to the procedure to which the taxpayer in *Samuels, Kramer* timely objected. See *Yakus* v. *United States*, 321 U.S. at 444. Further delay is inappropriate in these cases. Five judges have now found petitioners' contentions on the deductibility of their tax shelter losses "frivolous" or "ludicrous." See pp. 5, 8, *supra*.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1990

## APPENDIX

UNITED STATES TAX COURT
Washington, D.C. 20217

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First Western Government Securities, Inc. Cases

Docket Nos. 4934-82, 9307-82, 27146-82, 29012-82, 1240-83, 3250-83, 8616-83, 14965-83, 33016-83, 204-84, 3749-84, 7658-84, 11821-84

THOMAS L. FREYTAG AND
SHARON N. FREYTAG, ET AL., PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

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### NOTICE OF PROPOSED REASSIGNMENT

Judge Richard C. Wilbur, to whom the above-captioned cases were assigned and before whom these same cases were partially tried, retired as an active judge on the Court due to physical disability and immediately assumed senior status, effective April 1, 1986. By direction of the Chief Judge, Special Trial Judge Carleton D. Powell completed the trial of these cases. This will serve as notice to the parties that these cases will be reassigned to Special Trial Judge Carleton D. Powell for purposes of preparing the report pursuant to Rule 183 of this Court's Rules. It is further contemplated that all other cases involving the same issue, which are presently assigned

to Judge Wilbur, will be reassigned to Special Trial Judge Powell.

If any motions are contemplated with respect to this reassignment, they should be filed on or before August 25, 1986. If no motions are received by the Court by that date these cases will be reassigned to Special Trial Judge Powell and pursuant to Rule 183(c) of the Court Rules, action on this report will be taken by Judge Wilbur, or if not by this Division of the Court.

/s/ Samuel B. Sterrett
SAMUEL B. STERRETT
Chief Judge

Dated: Washington, D.C.
July 23, 1986

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